

NOT FOR PUBLICATION

JUN 29 2005

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

HUBERT SCHOEPS; CHRISTIANE
SCHOEPS, as heirs and beneficiaries of
SANDRA SCHOEPS, deceased,

Plaintiffs - Appellants,

v.

WHITEWATER ADVENTURES LLC;
MARK GHOLSON,

Defendants - Appellees.

No. 03-17071

D.C. No. CV-02-04784-JSW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted June 15, 2005^{**}
San Francisco, California

Before: TALLMAN, BYBEE, and BEA, Circuit Judges.

Hubert and Christiane Schoeps brought a diversity jurisdiction wrongful
death action against Whitewater Adventures and its managing owner, Mark

^{*} This disposition is not appropriate for publication and may not be cited
to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

Gholson, alleging negligence, breach of contract, and intentional misrepresentation arising from the death of their daughter, Sandra Schoeps, during a whitewater rafting trip organized by the defendants. The district court granted the defendants summary judgment on all claims. The Schoeps appeal only the dismissal of their negligence claim against Whitewater Adventures. We review *de novo* the grant of summary judgment. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004).

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. The district court correctly concluded that California law precludes recovery for Sandra's personal injuries because she expressly assumed the risk of harm when she signed Whitewater Adventures' liability release form before participating in the whitewater rafting activity. *See Sweat v. Big Time Auto Racing, Inc.*, 12 Cal. Rptr. 3d 678, 681 (Cal. Ct. App. 2004) (citation omitted). On the whole, the release is in plain language, contains a clear and comprehensive outline of the kinds of harm that may occur, and has the clear import of relieving Whitewater Adventures of liability for negligence or other harms. *See Saenz v. Whitewater Voyages, Inc.*, 276 Cal. Rptr. 672, 676-77 (Cal. Ct. App. 1990).

Moreover, we conclude that the liability release was not unconscionable. *See Ilkhchooyi v. Best*, 45 Cal. Rptr. 2d 766, 774-75 (Cal. Ct. App. 1995) (noting that unconscionability has "procedural and substantive elements, both of which

must be present to invalidate a clause”). Substantively, it is not unreasonable or unexpected for an organizer of adventure sports to reallocate risk to the participants through a liability waiver. *See, e.g., Ford v. Gouin*, 834 P.2d 724, 728 (Cal. 1992). Procedurally, there were no hidden terms in the liability release, and the most oppressive aspect of the situation was that if Sandra refused to sign it she could not go with the group on the river and might be stuck without transportation in an isolated area. But this was not caused by any action or inaction on Whitewater Adventures’ part; nor is there any evidence in the record that Denyse Caven, who had driven Sandra to the meeting point, would have been unwilling to leave with Sandra or to let Sandra drive herself, nor that no other transportation was available. The district court recognized that Sandra had only a few minutes to decide whether to sign the release and would have lost her pre-paid ticket price had she refused to sign. However, this is not sufficient to constitute oppression or lack of meaningful choice, particularly insofar as Sandra had been given a brochure before the rafting trip in which Whitewater Adventures stated: “[w]e require all trip participants to sign a liability release waiver before embarking on your trip.” *See Ilkhchooyi*, 45 Cal. Rptr. 2d at 775.

We may affirm on any ground supported by the record, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004), and therefore do

not reach the issue of whether recovery is also barred under the primary assumption of risk doctrine. *See Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 67-68 (Cal. Ct. App. 1995).

The Schoeps' maritime jurisdiction claim was not presented to the district court and so we do not consider it here. *See United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991).

AFFIRMED.